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No. 780

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

DISTRICT OF COLUMBIA, *Petitioner*,

v.

THE SMOOT SAND & GRAVEL CORPORATION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the District of Columbia, respectfully shows and represents unto your Honors that:

STATEMENT OF THE MATTER INVOLVED

Laws applicable to the District of Columbia, enacted by the Congress of the United States in the exercise of exclu-

sive jurisdiction over the District of Columbia pursuant to the Constitution of the United States, require that *all personal property* in the District of Columbia subject to taxation, *including vessels, ships and boats*, shall be listed and assessed for taxation at *not less than the full and true value thereof in lawful money.*

The respondent, a Delaware corporation having its only office, with exception of its statutory office in Delaware, in the District of Columbia, has, since 1927 when it was organized, owned various vessels and boats (consisting of dredges, launches, tugboats, and scows). The tugboats and many of the scows, during the fiscal years ended June 30, 1941, to June 30, 1945, inclusive, were daily used in the District. They were sent down the Potomac River from the District of Columbia to various sand and gravel deposits of the respondent in the Potomac River and its tributaries from which sand and gravel was brought back to respondent's storage places in the District of Columbia (R. 34-37).

The Assessor of the District of Columbia assessed personal property taxes for the fiscal years referred to above against respondent upon the basis of the full and true value of the tugboats and scows which were daily in the District and used in transporting its sand and gravel in and to the District of Columbia. **The Assessor did not include in such assessments any of respondent's dredges or any of its scows which were out of the District, sunk, or otherwise out of commission (R. 35, 36).**

The respondent appealed from the aforesaid assessments to the Board of Tax Appeals for the District of Columbia upon the principal ground that the vessels and boats assessed were not subject to taxation in or had any situs in the District of Columbia, permanent or otherwise (R. 7, 15).

The Board of Tax Appeals sustained the validity of the assessments, except with respect to certain scows (R. 42,

120, 121). Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for a review of the decision of the Board of Tax Appeals upon several grounds, one being the contention that imposition of tangible personal property taxes by the District of Columbia on the basis of 100% of value rather than on the basis of apportionment is in violation of the Constitution of the United States, particularly in violation of the grant of power extended to the Congress over the District of Columbia by Art. I, Secs. 8 and 9 of the Constitution, the Fifth Amendment thereto, and the "spirit" of the commerce clause, "as well as other provisions of the Constitution" (R. 2-7).

On March 28, 1949, the United States Court of Appeals reversed the decision of the Board of Tax Appeals and held "that the District of Columbia could constitutionally tax these tangibles, used exclusively in interstate commerce, upon a fair apportionment of value, but could not constitutionally tax them at full value." (R. 201.)

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered March 28, 1949 (R. 202). The jurisdiction of this Court to issue the writ applied for is invoked under Title 28, U. S. Code, Congressional Service (1948), Sec. 1254 (Act of June 25, 1948, 62 Stat. ....., ch. .....).

QUESTION PRESENTED

The question presented is whether a statute enacted by the Congress of the United States taxing *all* property at its full value, specifically including vessels, ships and boats, in the District of Columbia, is within the Constitutional jurisdiction and power of the Congress of the United States.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The United States Court of Appeals has decided a question of substance relating to the construction and application of a statute enacted by the Congress of the United States under the Constitution which has not been but should be settled by this Court. The question whether vessels, ships and boats in the District of Columbia may be constitutionally taxed under laws enacted by the Congress of the United States applicable to the District of Columbia has not been decided by this Court. This question is not applicable to the respondent only; it is applicable to all owners of vessels, ships and boats in the District of Columbia not exempted from taxation and which are used similarly to those of respondent.

2. The United States Court of Appeals has not given proper effect to the decisions of this Court with respect to what constitutes "actual situs" of tangible personal property in a taxing jurisdiction.

3. The United States Court of Appeals has decided a very important question of law concerning the Constitution of the United States and statutes enacted by the Congress of the United States which decision is in conflict with the applicable decisions of this Court and prior decisions of the Court of Appeals. In deciding this case the Court of Appeals has committed a grievous error similar to one which this Court corrected by reversing said Court of Appeals some years ago.

WHEREFORE, Your petitioner prays the allowance of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in this cause, and that said cause may be reviewed and determined by this Honorable Court, and that the judgment of said Court of Appeals

may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

District of Columbia,
Petitioner.

By:

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinions of the Board of Tax Appeals for the District of Columbia (R. 43-49) and the United States Court of Appeals for the District of Columbia Circuit (R. 200) are not yet reported.

GROUNDS OF JURISDICTION

The grounds on which the jurisdiction of this Court are invoked are:

1. The United States Court of Appeals has decided a question of substance relating to the construction and application of the Constitution and a statute enacted by the Congress of the United States which has not been but should be settled by this Court.

2. The United States Court of Appeals has not given proper effect to the decisions of this Court applicable to the question decided.

3. The United States Court of Appeals has decided an important question of law involving the Constitution and a statute of the United States applicable to the District of Columbia which decision is in conflict with the decisions of this Court and its prior decisions relating to the power of Congress.

STATEMENT OF THE CASE

The case, insofar as material to the question presented, is as follows:

The respondent is a Delaware corporation, organized in 1927 (R. 34). During all of the tax years involved in this proceeding (fiscal years ended June 30, 1941 to 1945, inclusive) respondent's business consisted of dredging sand and gravel from certain deposits in the Potomac River and its tributaries, transporting such material by means of scows towed by its tugs to its storage places in the District of Columbia, and thereafter selling it from such storage places and transporting it therefrom to the points of delivery, in most cases by truck and in some cases by means of scows (R. 34-36; Findings 2-7).

Respondent's only office, with the exception of its statutory office in Delaware, was in the District of Columbia. It never transacted any business in Delaware except when representatives went there to negotiate or close contracts with customers in that State, and it held some of its corporate meetings there (R. 37; Finding 11).

Respondent's shipyards, and its storage yards for the material in which it deals, are located in the District of Columbia, and were so located during the tax years involved (R. 35, 37; Findings 4, 5 12). Such repairs to respondent's scows and tugs as could not be done at the sites of dredging operations were made at respondent's shipyards in the District (R. 37; Finding 12).

The aforesaid sand and gravel was obtained by respondent from 13 sand and gravel deposits located in the Potomac River and its tributaries down-river from the District, which it owned, except that in 1941 and 1942 it also obtained sand and gravel from the vicinity of Dangerfield Island in the Potomac River. Nine of the 13 deposits were located in Maryland and 4 were in Virginia. Dredging operations at Dangerfield Island may have been carried on wholly or partly in the District of Virginia (R. 34, 36, 146; Findings 2, 7).

During the tax years concerned respondent operated the tugs and scows involved in conducting its business as fol-

lows: At the beginning of business on each working day approximately one-half of its scows were in the District of Columbia, and approximately one-half thereof were at the dredges down the river outside the boundary of the District. At about 7 o'clock A. M. at the beginning of business the unloaded scows that were in the District were towed by respondent's tugs to the sites of dredging operations. They were left there, and the tugs then proceeded to tow back to the District those scows which had been at the dredging sites overnight. The Potomac River, for about ten miles down-river from respondent's shipyards, was within the boundaries of the District of Columbia (R. 35, 36; Findings 5, 6). The process of towing the loaded scows to the District began about three or four hours after the movement of the tugs down-river with the unloaded scows. The scows arrived in the District after lunch and, after having been unloaded, were towed back to the sites of dredging operations. All of such equipment (the scows and tugs here involved) were in the District each working day (R. 35, 36; Finding 6).

Throughout each of the years involved, respondent had scows varying in number from about 65 to 87 engaged in its operations within and without the District (R. 35; Finding 6). Of these, 21 were out of the District, sunk or otherwise out of commission (R. 36; Finding 10; R. 171, 172) *and were not included in the District tax assessment;* 4 were used to furnish fuel to respondent's dredges and came into District waters every week or ten days to be loaded with fuel, remaining at other times at the sites of dredging operations (R. 36; Finding 8); and 4 were at all times outside the District engaged in stripping stumps, clay and mud from sand and gravel (R. 36; Finding 9). The 8 fuel and stripping scows were held by the Board of Tax Appeals not to be subject to taxation by the District for the years involved, and a refund of taxes and interest thereon was authorized (R. 42, 120, 121, 125-127). The re-

maining scows which were daily in the District, are those involved in this proceeding.

Respondent did not, for any of the years involved, pay any personal property taxes on its scows to Maryland, Virginia or Delaware (R. 38; Findings 15, 16). *The only scows of respondent taxed anywhere were a portion of the total number thereof, taxed by the District as shown above, which scows were daily in the District incident to the conduct of respondent's District business.*

During the tax years involved the Virginia taxing authorities taxed six dredges and eight tugs or launches belonging to respondent (R. 38; Finding 16). The basis for such taxation was that the property taxed had its "home port" in Virginia where it was registered (licensed) (R. 147, 148, 183-186). *The dredges were not taxed by the District* (R. 35; Finding 3).

Respondent did not, for any of the years involved, pay any taxes to the State of Delaware (except franchise taxes), or any personal property taxes to the State of Maryland (R. 38; Finding 16).

Respondent's treasurer pointed out to District assessing authorities in 1938 that a large part of its deliveries were outside of District of Columbia waters and that consequently, for days at a time, some of its tugs and scows were not in District waters. The Board of Tax Appeals found, however, that (R. 82; Finding 17):

> "• • • This condition as to petitioner's tugs and scows, except in regard to scows used in stripping operations and its fuel scows, did not exist during the fiscal years here involved."

During July of the years 1940 through 1945 respondent filed its personal property tax returns with the Assessor of the District for the fiscal years ending on the following June 30th and reported therein as the value of its water craft and boats the arbitrary figure of $15,000 (R. 39, 117;

Findings 18, 27, 29) which returns the Board of Tax Appeals found were "false and incorrect". The value of such property was greatly in excess of the amount reported each year (R. 41, 117; Findings 23, 28).

The Board of Tax Appeals affirmed the assessments, except with respect to the aforesaid 8 fuel and stripping scows (R. 42, 119-121).

The Court of Appeals reversed, holding that the District could not constitutionally tax the tugs and scows involved at "full value".

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia erred:

(1) In holding that vessels and boats which are daily used in the District of Columbia in the conduct of a local District business, and commingled with the general mass of property in the District, cannot constitutionally be taxed at full value.

(2) In holding that for many years the aforesaid vessels and boats have been taxed upon an apportionment of their value, and that the District could tax such property only upon a fair apportionment of value.

STATUTES INVOLVED

Act of July 1, 1902, 32 Stat. 590, 617, c. 1352, Sec. 6, Par. 1; D. C. Code 1940, Sec. 47-1203, in material part as follows:

> "That hereafter the assessor of the District of Columbia, or his successor in office, shall annually cause to be prepared a printed blank schedule of all tangible personal property * * owned or held in trust or otherwise, subject to taxation * * and of the classes of corporations and companies to be assessed, together with the rate of tax prescribed, to which shall be appended an

affidavit in blank, setting forth that the foregoing presents a full and true statement of all such personal property, * * * * * *. Every * * corporation * * in said District liable to taxation hereunder * * shall, * * fill out the proper blanks in said schedule with a full and true statement, as in this section hereinbefore required, and make and sign an affidavit to the truth thereof, * * and thereupon said board of personal-tax appraisers, or any one of the members thereof, shall assess said property at its fair cash value, and enter the same in the columns upon said blanks provided for that purpose, and the amount thus ascertained shall be entered upon the books for taxation for * * each fiscal year * *: *Provided further*, That if the said board of personal-tax appraisers be not satisfied as to the correctness of the return of personal property made by any * * corporation * * said board may reject said return, and said board, or any one of the members thereof, may, from the best information he or they can procure, or by making such an examination of the personal property as may be practicable, assess the same in such amount as may to him or them seem just; * *."

Act of July 1, 1902, *supra*, Sec. 6, Par. 2 (paraphrased as to tax rate in D. C. Code 1940, Sec. 47-1207):

"PAR. 2. On all tangible personal property, assessed at a fair cash value (over and above the exemptions provided in this section), including vessels, ships, boats, tools, implements, horses, and other animals, carriages, wagons, and other vehicles, there shall be paid to the collector of taxes of the District of Columbia one and one-half per centum on the assessed value thereof."[1]

[1] The Commissioners of the District of Columbia were authorized by the Act of June 29, 1922, 42 Stat. 668, 669, c.249 (D. C. Code 1940, Sec. 47-501), to annually fix the rate of tax.

Sec. 4 of the Act of July 3, 1926, 44 Stat. 832, 833, c. 759, D. C. Code 1940, Sec. 47-713 and 47-1202:

> "Sec. 4. That hereafter all real estate and personal property in the District of Columbia subject to taxation shall be listed and assessed at not less than the full and true value thereof in lawful money."

Act of July 1, 1902, *supra*, Sec. 6, Par. 3, as amended by Sec. 2 of the Act of April 28, 1904, 33 Stat. 563, c. 1815, a portion of which is contained in D. C. Code 1940, Sec. 47-1212. The portion of the paragraph amended reads as follows (plain type shows the language of the 1902 Act; italicized type shows the matter added by the 1904 Act):

> "After the passage of this Act it shall be unlawful for any person or persons entering the District of Columbia subsequent to June thirtieth in each year and establishing a place of business for the sale of goods, wares, or merchandise, either at private sale or at auction, *or engaging in the business of common carrier by vessels, ships, or boats,* to conduct such business until a sworn statement of the value of such stock, *vessels, ships, and boats* has been filed with the assessor of the District of Columbia, who shall thereupon render a bill for the unexpired portion of the fiscal year at the same rate as other personal taxes are levied: *Provided, That this shall not apply to vessels, ships, or boats if it shall be made to appear by affidavit that any vessel, ship, or boat has been assessed for taxation and the taxes paid elsewhere.*"

(It will be noted that the amendment relates to "common carriers" by vessels, ships, and boats; not to vessels, ships,

and boats engaged in ordinary general business such as those of the respondent in this case.)

SUMMARY OF ARGUMENT

Congress has taxed, at full value, vessels, ships and boats in the District. The vessels and boats, comprising a portion of respondent's entire fleet, were specific and individual items and were in the District throughout the tax years with exception of fractional parts of days. They were assessed at full and true value as required by law. Such vessels and boats did not visit any port except the Port of the District of Columbia. The Court of Appeals committed grievous error in holding that such property could not constitutionally be taxed at full value.

The doctrine of "actual situs" applies. Even under the doctrine of "tax apportionment" relating to migratory property habitually within a tax jurisdiction when the specific items of property are constantly changing, which the Court of Appeals sought to apply, the Court of Appeals erred under the decisions of this Court. The tax as assessed does not violate the Fifth Amendment. If the tax is assessed at less than full value as suggested by the Court of Appeals, such assessment might be held to be so discriminatory to others as to be equivalent to confiscation and void under the Fifth Amendment.

The vessels and boats involved, comprising a portion of respondent's entire fleet, were not previously taxed upon an apportionment of their value. Respondent reported its vessels and boats for taxation for many years, including the tax years involved, at the arbitrary figure of $15,000 which was considerably less than their full and true value. This is not tax apportionment under the decisions of this Court. The Court of Appeals erred in holding that the property involved had been previously taxed upon an apportionment basis based on such facts. In taxing a portion of respondent's entire fleet, which portion has been in the District throughout the tax years, there is, in a practical sense, an apportionment of the number of vessels which may constitutionally be taxed at full value.

ARGUMENT

I

The Court of Appeals erred in holding that the property involved could not be constitutionally taxed at full value.

It is clear from the findings of fact of the Board of Tax Appeals, which have been sumarized in the foregoing statement of the case insofar as here material, that the Smoot Sand & Gravel Corporation, respondent, has conducted a sand and gravel business in the District of Columbia since it was incorporated. (For a long time prior to 1922 the same business was carried on by an individual—one Smoot, Tr. 327.) Its only business office, its shipyards, and its storage yards for the material in which it deals, are all located in the District of Columbia. It is a corporation "in said District" within the meaning of the tax statute involved (*Queen City Brewing Co.* v. *District of Columbia,* 77 U. S. App. D. C. 213, 134 F. 2d 44, cert. den. 319 U. S. 767). Its "commercial domicile" was and is in the District (*First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234, 237; *International Milling Co.* v. *Columbia Transportation Co.,* 292 U. S. 511, 519; *Md. & Va. Milk Producers' Association* v. *District of Columbia,* 73 App. D. C. 399, 119 F. 2d 787, cert. den. 314 U. S. 646). Only its bare legal or statutory domicile is elsewhere (Delaware).

The hub or "home" of all respondent's commerical activities is in the District of Columbia. It has never been elsewhere.

The vessels and boats of respondent which have been taxed under laws enacted by the Congress of the United States consist of *specific* tugs and scows which were *daily in the District* throughout the tax years involved, employed in respondent's business. Such vessels and boats had become commingled with and a part of the general mass of property in the District. Such vessels and boats daily

left the Port of the District of Columbia, except when remaining in respondent's shipyards, and went to several sand and gravel deposits located in the Potomac River and its tributaries in Virginia and Maryland and returned to the Port of the District of Columbia with the material which respondent sells. So far as the record discloses, these vessels and boats went to no other "Port" but the District of Columbia. The fuel scows, which the Board of Tax Appeals held to be not subject to taxation in the District and which are therefore not involved, did infrequently visit the Port of Alexandria, Va. But, even so, the navigable water area of the Port of Alexandria was within the District boundaries. *Smoot Sand & Gravel Corp.* v. *Washington Airport*, 283 U. S. 348.[2] Regardless whether the tugs and scows here involved went to sand and gravel deposits located down-river from the District in Virginia, or Maryland, they daily were in the District.

The Congress of the United States, exercising its exclusive power to legislate for the District of Columbia under Article I, Section 8, Clause 17 of the Constitution of the United States, enacted statutes (Act of July 1, 1902, and the Act of July 3, 1926, *supra*) taxing *all* tangible personal property "in the District" (over and above property exempted [3]) at "not less than the full and true value thereof". The statute specifically includes "vessels, ships, boats," as taxable tangible personal property.

The tugs and scows here involved were clearly "vessels" and "boats". They were "in the District". They had, as the Board of Tax Appeals said (R. 45), "an actual situs and physical presence in the District throughout the entire year, with the exception of fractional parts of days." The District assessing officials assessed the taxes involved

[2] The Act of October 31, 1945, 59 Stat. 552, c. 443, establishing the Virginia-District boundary at Alexandria [illegible] "pierhead line" was enacted subsequent to any of the tax dates involved.

[3] Act of July 1, 1902, *supra*, Sec. 6, Par. 10, as amended (D. C. Code 1940, Sec. 47-1208).

based upon the "full and true value" of the specific property, as the statute requires. Other vessels and boats which were used as an integral part of respondent's business and which had acquired a situs outside the District were not assessed by District tax officials.

The Board of Tax Appeals stated in its opinion (R. 48):

> "If the holding that petitioner's equipment had a taxable situs in the District for the taxable years involved is correct, the Constitutional questions raised by petitioner as to taxation of property having no such situs are not applicable."

The Court of Appeals, in reversing the Board of Tax Appeals, concluded that the "District of Columbia could constitutionally tax these tangibles, used exclusively in interstate commerce, upon a fair apportionment of value, *but could not constitutionally tax them at full value.*" (Italics supplied.) This conclusion was reached notwithstanding the fact that only a portion of the entire number of vessels and boats of the respondent used in its sand and gravel business was subjected to District taxation, and notwithstanding the fact that the statute involved requires that such property shall be assessed "at not less than the full and true value thereof". As pointed out above, the only vessels and boats subjected to District taxation under the decision of the Board of Tax Appeals were specific tugs and scows which were daily in the District throughout the tax years involved.

In reaching its conclusion the Court of Appeals said (R. 201):

> "* * In order to be constitutional, a property tax on such tangibles must be apportioned upon some fair basis. This has been the consistent holding of the Supreme Court. * *"

All the cases cited by the Court to the statement just quoted involved State tax cases and the jurisdiction or power of the various States to tax under the limitations of the Commerce Clause of the Constitution or the Fourteenth Amendment, or both. It is well settled that the commerce clause operates as a limitation solely upon the States and constitutes no bar to action of the Congress of the United States, and that the Fourteenth Amendment is not applicable in the District of Columbia. These principles were recently announced by the Court of Appeals in *Neild et al.* v. *District of Columbia,* 71 App. D. C. 306, 110 F. 2d 246, based almost entirely upon decisions of this Honorable Court,[4] and after the case was twice argued, first by a three-judge Court and again by a five-judge Court. One of the cases cited was *Wight* v. *Davidson,* 181 U. S. 371, which was an appeal from a decree of the Court of Appeals of the District of Columbia reversing an order or decree of the Supreme Court of the District confirming an assessment upon lands for improvements made. The Court of Appeals relied upon a similar case which originated in Ohio and involved due process of law under the Fourteenth Amendment. In reversing the Court of Appeals, with directions to affirm the decree of the Supreme Court of the District of Columbia, this Court said (181 U. S. 384):

> "In the present case is involved the constitutionality of an Act of Congress regulating assessments on property in the District of Columbia, and in respect to which the jurisdiction of Congress, in matters municipal as well as political, is exclusive, and not controlled by the provisions of the 14th Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the 5th Amendment to the Consti-

[4] And see *United States* v. *Darby,* 312 U. S. 100, as to the power of Congress under the commerce clause.

tution of the United States, which provide, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. But it by no means necessarily follows that a long and consistant construction put upon the 5th Amendment, and maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the 14th Amendment as controlling state legislation."

It is respectfully submitted that the Court of Appeals has committed an identical error in the present case.

It is further respectfully submitted that, even under the tax apportionment doctrine introduced by *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, which was extended to include ships and vessels operating on inland waters in *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 (decided four days before the present case was argued), the Court of Appeals has grievously erred. That doctrine is not applicable to taxation of specific personal property having an "actual situs" in a tax jurisdiction, even when such jurisdiction is Constitutionally limited or restricted under the commerce clause and the Fourteenth Amendment. The rule of tax apportionment applies only where migratory property is habitually employed within a State and when the specific and individual items of property are not continuously the same but are constantly changing as the nature of their use requires. *Johnson Oil Co.* v. *Oklahoma*, 290 U.S. 158; *American Refrigerator Transit Co.* v. *Hall*, 174 U.S. 70, 82. The basis of the apportionment assessment may be such proportion of capital stock as the number of miles of route traveled within the State bears to the total number of miles in all States (the *Pullman Car Co.* case,

supra), by an appraisement and valuation of the average number of items or average amount of property habitually used and employed within the State (the *Johnson Oil Co.* case, *supra*), or by any appropriate means of reaching the "actual or full value" of the portion of the property used within a State, including intangible values (*Pullman Co.* v. *Richardson*, 261 U.S. 330). The mileage basis used in the *Pullman Car Co.* case, *supra*, was not permitted in *Union Tank Line Co.* v. *Wright*, 249 U.S. 275, because it was arbitrary and the consequent valuation of the property was grossly excessive. In the case last cited this Court held that the average number of cars used in the State during the tax year should be taxed on a basis of *true value* of the cars rather than on a mileage basis.

The Board of Tax Appeals distinguished the *Queen City Brewing Co.* case, *supra*, in deciding this case and said (R. 45):

> "* * * But the taxability of the property involved in this appeal rests not on any such 'representative' theory, or 'average' assessment, but on the fact that *the very property sought to be taxed had an actual situs and physical presence in the District throughout the entire year*, with the exception of fractional parts of days." (Italics supplied.)

This Honorable Court has held that the State of domicile has jurisdiction to tax the personal property of its corporations, unless such property has acquired an "actual situs" in another State, and that by "actual situs" is meant continuous presence in another State *which thereby supplants the home State* and acquires the taxing power over such personalty. *Union Transit Co.* v. *Kentucky*, 199 U.S. 194; footnotes 1 and 2 in *Northwest Airlines* v. *Minnesota*, 322 U.S. 292, 295, 296. Under this rule the jurisdiction of a State where the property has an actual situs is not lost

or curtailed even if every item of that property should be taken successively into another State for a day, a week, six months, or other period of time less than a tax year. *New York Central R. Co.* v. *Miller*, 202 U.S. 584; *Northwest Airlines* v. *Minnesota, supra.* Since the "domicile of actual situs" (*Southern Pacific Co.* v. *Kentucky*, 222 U.S. 63, 67) supplants the statutory domicile or domicile of origin under this rule, it makes no difference that personal property taxes have been paid upon some portion of the property in other tax jurisdictions (*Northwest Airlines* v. *Minnesota, supra*, p. 295). See also *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U.S. 409; *Old Dominion S. Co.* v. *Virginia*, 198 U.S. 299.

The *Pullman's Palace Car Co.* case and certain others decided by this Court concerning the rule of tax apportionment referred to above, distinguishing between that rule and the rule of "actual situs", had been decided before the Congress enacted the tax statute involved on July 1, 1902. As this Court so aptly pointed out in the case of *Southern Pacific Co.* v. *Kentucky, supra* (p. 75): "A ship is not intended to stay in port, but to navigate the seas." Certainly the Congress knew of the very restricted navigable water area within the boundaries of the District of Columbia when it enacted the statute involved, knew of the decisions of this Court on the subject, knew that vessels, ships, and boats (which were specifically mentioned in the statute) would necessarily have to leave the District and return in order to be useful for the purposes intended, and intended to tax such vessels, ships and boats as had an actual situs in the District at their "fair cash value" or, in other words, their "full and true value." Then, in 1904, Congress amended the law so as to tax vessels, ships and boats entering and engaging in the business of common carrier in the District, at the same rate as other tangible personal property, without regard to the "actual situs" rule, unless it appeared *by affidavit* that "any vessel, ship,

or boat has been assessed for taxation and the taxes paid elsewhere." Also, by an Act approved December 15, 1945 (59 Stat. 610, c. 579, D. C. Code 1940, Supp. VI, Sec. 47-1215), the Congress prescribed different bases for taxing rolling stock of railroads and other companies. Section (b) of that Act taxes such rolling stock as is primarily located in the District (i.e., having its "actual situs" in the District) at its "full and true value". Section (c) of that Act begins: "(c) Such rolling stock as is not primarily located in the District of Columbia shall be reported and taxed in the manner following" and then proceeds to describe in detail the manner in which the tax on such rolling stock shall be apportioned. It is therefore self-evident in the statute that Congress recognized the essential difference between personal property which had an "actual situs" in the District and should be taxed at its "full and true value" and personal property which came into the District habitually but only temporarily and, therefore, should be taxed on the "apportionment" basis. **All decisions of this Court on the subject up to and including the Northwest Airlines case, supra, had been decided prior to enactment of the Act of December 15, 1945, supra.** It is further significant to note that if the Congress had omitted Section (b) of the 1945 Act, all railroad rolling stock, whether or not it had an actual situs in the District, would have been taxed on an apportionment basis.

In view of the foregoing, the only Constitutional question presented falls within the language of the Fifth Amendment. The tax involved does not violate the Fifth Amendment and, therefore, the Court of Appeals should have affirmed the Board of Tax Appeals. Clearly neither the statute nor the assessments constitutes a taking of property without due process of law under the decisions of this Court involving both the Fifth and Fourteenth Amendments. *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24; *Stebbins* v. *Riley*, 268 U. S. 137; *Tyler* v. *United States*,

281 U. S. 497, 504; *Union Tank Line Co.* v. *Wright, supra; Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444. As a matter of fact, if the tax involved were one assessed by a State the theory of the Court of Appeals of assessing the property at less than full and true value would be repugnant to the equal protection clause of the Fourteenth Amendment (*Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 515, 516) and, even under an act of the National Congress, might possibly be so discriminatory to others as to be "equivalent to confiscation and therefore void under the Fifth Amendment" (*Hamilton National Bank* v. *District of Columbia*, 81 U. S. App. D. C. 200, 203, 156 F. 2d 843, 846).[5]

II

The Court of Appeals erred in holding that the vessels involved have heretofore been taxed upon an apportionment of value.

The Court of Appeals stated in its opinion (R. 200):

> "The question is whether the District of Columbia can levy its property tax upon the full value of these tugs and scows. For many years they have been taxed upon an apportionment of their value based upon use inside and use outside the District."

The "tugs and scows" referred to by the Court were not the *entire* fleet of vessels and boats used by respondent in its sand and gravel business within and without the District. Such tugs and scows were those which were in the District throughout the entire tax years except for fractional parts of days, as pointed out above. They constituted only a *portion* of the entire fleet. This case, there-

[5] This case is now pending decision in the Court of Appeals (No. 9833) on second appeal from the Board of Tax Appeals.

fore, is not at all like the *Johnson Oil Co.* case, *supra,* where the Supreme Court of Oklahoma sustained assessments "on the entire fleet of cars"; nor like the *Union Transit Co.* case, *supra,* where the Court of Appeals of Kentucky also sustained assessments on the "entire number" of cars used within and without the State. Both of these cases, reversed by this Court, were relied upon by the Court of Appeals in deciding this case.

The material facts which are set forth in our Statement of the Case, *supra,* are based upon findings of fact of the Board of Tax Appeals. Findings 18 and 27 (R. 39, 117) show that respondent reported its vessels and boats for taxation during the tax years involved at an arbitrary value of $15,000. The full and true values thereof as determined by the District assessor and affirmed by the Board of Tax Appeals ranged from $330,943 for the year 1941 to $198,253 for the year 1945 (Finding 23, 28; R. 41, 117). The Board pointed out that respondent, in 1938, was reporting the value of its floating equipment at $15,000 (Finding 17, R. 82). District assessors informed respondent's treasurer, about 1943 or 1944, that they did not agree with respondent's basis of reporting its boats for taxation at a valuation of $15,000 but respondent nevertheless continued to report it at such value (R. 153-155).[6] This, clearly, did not constitute an apportionment of the value of the tugs and scows referred to by the Court. The Board of Tax Appeals did not make a finding of fact that the tugs and scows involved have for many years been taxed upon an apportionment of their value. The Acts of July 1, 1902, and July 3, 1926, *supra,* do not permit taxation of vessels and boats on a basis of *apportionment* of *value.* See *Greene* v. *Louisville & Interurban R. R. Co., supra,* at p. 516, where this Court said that the basis of assessment can be full value or any

[6] The omissions of taxing officers in previous years cannot control the duty imposed by law upon their successors. *Vicksburg S. & P. R. Co.* v. *Dennis,* 116 U. S. 665, 670.

other percentage or portion thereof so long as the basis is applied *"to all alike"*.

CONCLUSION

It is respectfully submitted that the Court of Appeals grievously erred in reversing the Board of Tax Appeals.

Wherefore, we urge that the writ of certiorari be granted.

Respectfully submitted,

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